

November 27, 2012

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The Honorable John Cosgrove, Chairman  
Virginia Housing Commission  
General Assembly Building  
P.O. Box 406, Room 416  
Richmond, VA 23218

Re: City of Chesapeake Proffer Policy

Dear Delegate Cosgrove,

On November 13, 2012, the City Council adopted a comprehensive amendment of the Chesapeake Proffer Policy, a copy of which is attached for review. The amendment tracks the recommendations of the Chesapeake Proffer Policy Review Committee, which met over several months prior to issuing a Final Report on April 16, 2012. The amendments include the following:

- Maximum anticipated cash proffer amounts substantially reduced to \$4,000 per detached single-family dwelling unit, \$3,000 per attached single-family dwelling unit and \$2,000 per multi-family dwelling unit.
- Establishment of mitigating circumstances that may warrant reduction of the maximum anticipated cash proffer amounts.
- Provision for the immediate use of cash proffers for renovations, repairs and maintenance (excluding routine maintenance) of impacted public facilities, provided the work is included in an approved capital improvement project.
- Provision for the use of cash proffers for debt service for capital improvement projects reasonably related to the rezoning.

The purpose of this letter is to address the use of cash proffers for capital improvements involving renovations, repairs and maintenance of impacted public facilities. In my opinion, state law permits the use of cash proffers for renovation, repair and maintenance of public facilities, provided that the following requirements are met: i) the project is included in the approved capital improvement plan, ii) the project is consistent with the Comprehensive Plan, and iii) the work is carried out on a public facility that will serve the residents generated by the rezoning.

The following represents my legal analysis, which concludes that the use of proffers for renovation, repair or maintenance of impacted public facilities is lawful, provided the criteria in Section 15.2-2298 of the Code of Virginia are met. It should be emphasized that the Proffer Policy does not permit the use of cash proffers for routine maintenance but only for those maintenance projects that are part of the City's approved capital improvement plan and necessary to preserve the functionality of a public facility impacted by the rezoning.

**Purpose of Conditional Zoning:**

Proffers may be made voluntarily as part of a conditional rezoning application in order to protect the surrounding community from adverse impact of the proposed rezoning. The legislative policy for conditional zoning is set forth in Section 15.2-2296 as follows:

§ 15.2-2296. Conditional zoning; declaration of legislative policy and findings; purpose.

It is the general policy of the Commonwealth in accordance with the provisions of § 15.2-2283 to provide for the orderly development of land, for all purposes, through zoning and other land development legislation. Frequently, where competing and incompatible uses conflict, traditional zoning methods and procedures are inadequate. In these cases, more flexible and adaptable zoning methods are needed to permit differing land uses and the same time to recognize effects of change. It is the purpose of §§ 15.2-2296 through 15.2-2300 to provide a more flexible and adaptable zoning method to cope with situations found in such zones through conditional zoning, whereby a zoning reclassification may be allowed subject to certain conditions proffered by the zoning applicant for the protection of the community that are not generally applicable to land similarly zoned. The exercise of authority granted pursuant to §§ 15.2-2296 through 15.2-2302 shall not be construed to limit or restrict powers otherwise granted to any locality, nor to affect the validity of any ordinance adopted by any such locality which would be valid without regard to this section. The provisions of this section and the following six sections shall not be used for the purpose of discrimination in housing.

Thus, the General Assembly enacted conditional zoning in order to add flexibility to the zoning process. The statutory authority is permissive and is not intended to limit powers otherwise granted to any county, city or town.

**Statutory Authority for Cash Proffers in High-Growth Localities:**

Section 15.2-2298 of the Code of Virginia authorizes certain high-growth localities, including the City of Chesapeake, to accept voluntary cash proffers as part of a conditional rezoning application. The proffers must be reasonable and satisfy the following enumerated criteria:

- (i) The proposed rezoning must give rise to the need for the proffers;

- (ii) The proffers must have a reasonable relation to the rezoning; and
- (iii) The proffers must be in conformity with the local comprehensive plan.

In addition, Section 15.2-2298 states that “[n]o proffer shall be accepted by the locality unless it has adopted a capital improvement program . . .” and “the payment of cash shall not be made until the facilities for which the . . . cash is tendered are included in the capital improvement program, provided that nothing herein shall prevent a locality from accepting proffered conditions which are not normally included in a capital improvement program.”

While state law clearly requires that cash proffers be expended on facilities and projects impacted by the rezoning, the precise nature of the expenditure is not strictly regulated. In fact, when the statutes address expenditures, the legislature gives localities fairly broad authority. For example, Section 15.2-2302.2 provides that proffers may be expended on “transportation improvements,” which are defined broadly to include:

[R]eal or personal property acquired constructed, improved or used for constructing, improving or operating any (i) public mass transit system or (ii) highway, or portion or interchange thereof, including parking facilities located within a [transportation] district created pursuant to this title [Title 15.2]. Such improvements shall include, without limitation, public mass transit systems, public highways, and all buildings, structures, approaches, and facilities thereof and appurtenances thereto, rights-of-way, bridges, tunnels, stations, terminals and all related equipment and fixtures.

Note that the definition of “transportation improvements” contemplates the use of proffers for any real or personal property “improved or used for constructing, improving or operating” a variety of transportation facilities. Such language is a far cry from limiting the use of proffers to physical improvements directly related to increasing capacity.

Additionally, a locality is not necessarily bound to use cash proffers for the exact public benefit contemplated at the time the proffer is accepted. State law allows a locality to spend cash proffers on “alternative improvements of the same category within the locality in the vicinity of the improvements for which the cash payments were originally made.” See Section 15.2-2303.2 of the Code of Virginia, 1950, as amended. Again, the law does not require a direct tie between the use of cash proffers and the expansion of capacity.

#### **Chesapeake Zoning Regulations Governing Use of Cash Proffers:**

Pursuant to the authority granted localities under state law, the City Council adopted Section 16-200 of the Chesapeake Zoning Ordinance which authorizes the acceptance of

voluntary cash proffers, provided that the proffers are reasonable and meet the criteria of state law as described above. The Zoning Ordinance also provides flexibility in spending cash proffers. For example, as a component of the rezoning application in which cash proffers are offered, the applicant is required to acknowledge that “the improvements for which the . . . money is being proffered are part of the City’s overall program for capital improvements, even if not contained in the immediate five-year improvement plan.” See Section 16-202.A.12. of the Chesapeake Zoning Ordinance.

Proffers approved by the City Council become part of the zoning regulations applicable to the rezoned property. See Section 16-204 of the Chesapeake Zoning Ordinance. Accordingly, the actual language of the cash proffer must be considered in determining whether the proposed use of the funds is permitted.

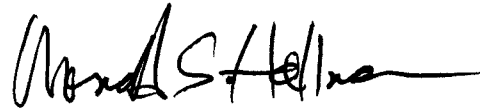
**Legal Opinion:**

Based on the foregoing authorities, I have given consistent opinions over the years that proffer funds may be used for approved capital improvement projects that involve the purchase of capital assets, land acquisition, and construction, expansion, renovation maintenance and repair of public facilities. The project must be impacted by the conditional rezoning in order to establish a reasonable relationship between the rezoning and the proffer, must be consistent with the Comprehensive Plan and must be included in the approved capital improvement plan.

It is my understanding that other localities in Virginia also use proffers for major renovations and repair projects. Clearly, the preservation of an existing capital facility through major maintenance and repair serves the needs of the residents generated by a rezoning by ensuring that impacted public buildings remain usable for their intended purpose. To reiterate, the Chesapeake Proffer Policy does not sanction the use of proffers for routine maintenance but rather, requires that the project be necessary to the continued functionality of the facility. In my opinion, this use is not prohibited by state law and the Chesapeake Proffer Policy is not only defensible but an appropriate exercise of the zoning authority given to high-growth localities under Section 15.2-2298 of the Code of Virginia.

I look forward to discussing these issues at the December 5<sup>th</sup> meeting of the Virginia Housing Commission. Please advise if I may provide any additional information prior to the meeting.

Very truly yours,

A handwritten signature in black ink, appearing to read "Ronald S. Hallman", with a long horizontal flourish extending to the right.

Ronald S. Hallman  
City Attorney

Enclosure

cc: Amar Dwarkanath, Interim City Manager  
Grady Palmer, Assistant City Attorney  
Richard Hartwick, Assistant City Attorney  
Karen Shaffer, Acting Director of Planning